No. 4073

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND MACHINERY DEPOT,
a Corporation,
Plaintiff in Error,

vs.

JAMES C. DAVIS, Director General of Railroads of the United States, and Agent of the United States, under the Transportation Act, 1920, Providing for the Termination of Federal Control of Railroads,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANT IN ERROR

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STATEMENT OF THE CASE.

This action was brought by the Director General of Railroads to recover unpaid freight charges on four cars of flanged shafts shipped in March and April, 1919, from Camden, New Jersey, to the Plaintiff in Error for use in connection with shipbuilding operations carried on in Seattle. At the time of the shipment and at the point of origin the shipper billed these cars as containing rough forgings. An inspection by the Transcontinental Freight Bureau at Seattle showed that machine work had been done on all these shafts, and all four cars were classified as shafts or shafting, and freight bills showing charges upon such classification were presented to the plaintiff in error upon the basis of a Class A rate, or a rate of $2.40 a hundred (Tr. p. 31). Later new bills were presented upon the basis of fifth class,

or a rate of $2.37½, which is the rate sued for in this case (Tr. pp. 26, 49), plaintiff in error contending that the commodity on these cars should be classified as rough forgings, refused to pay the expense bills as presented, and returned them with a letter which is in evidence as Plaintiff's Exhibit 12 (Tr. p. 56) in this letter which referred to one of these cars, but the same position was taken as to all four cars, the plaintiff in error stated:

> "We are entitled to a rate of $1.37½ per 100 lbs. on this car in accordance with Item 3540, Page 296, Tariff 40, as this car contains Forgings and not finished shafting. The Shafting is still in the rough state and must be finished in our Shop here."

Subsequently the plaintiff paid charges upon the basis of $1.37½ per hundred, and this suit was filed to collect the difference between that rate and a rate of $2.37½ per hundred, which the Railroad Administration contends is the correct rate in accordance with the duly filed and published tariffs and classifications in effect at the time of this movement.

The appointment of the defendant in error as Director General and the corporate capacity of the plaintiff in error was admitted by the pleadings. The pleadings also admit that the four cars of flanged shafts were shipped from Camden, New Jersey, and

delivery made as alleged to the plaintiff in error.

The evidence also establishes without dispute that these cars were of the weight as shown by the expense bills in evidence and that if the rate as found by the trial court applies, there is owing on account of freight charges and war tax the full amount for which judgment was entered (Tr. p. 36).

This left as the only issue, submitted to the trial court, the question as to the character of the material shipped and its proper classification under the tariffs.

On this question the defendant in error presented as a witness Mr. A. B. Cade, Superintendent of the Transcontinental Freight Bureau, Weighing & Inspection Department, North Pacific Coast Territory, such bureau being established in the interests of both the carriers and the shippers to see that all freight is properly described, so that the proper rates may be applied by the carriers, the bureau being an independent bureau and its inspection and classification service embracing all of the Transcontinental lines ~~and~~ the North Pacific Coast territory (Tr. pp. 25, 26). Mr. Cade had been connected with this work for some thirty-nine years and the inspector who inspected and classified the four cars in question was working under his direction and supervision (Tr. pp. 25, 26).

The defendant in error also introduced in evidence the effective tariffs and classifications and also the specifications produced upon its demand by the plaintiff in error and covering the shafts transported on the four cars in question (Tr. pp. 35-7, 46-7, Exhibits 5 and 6).

The plaintiff in error offered the testimony of George B. Gemmill, its Assistant Secretary, who had charge of the purchasing of the materials covered by these shipments, and W. S. Matheson, Vice President and Manager of the Bacon & Matheson Forge Company, doing business at Seattle.

The defendant in error, in accordance with the classification as made upon the arrival of these cars at Seattle, contended that the four cars of flanged shafts having been roughly machine turned, were covered by items 4, 7 and 9 of page 301 of The Western Classification No. 55 (Tr. pp. 34-5, 48), which is in evidence as Exhibit 5, Tr. p. 46.

The plaintiff in error at the trial and on its appeal contends that this classification as so made is not a proper classification, but that the commodity loaded on these cars should be classified as either rough forgings, under the authority of Tariff 4-0, page 296, Item 3540, under the general classification of iron and steel articles (Ex. 6, Tr. p. 47), or as plain shafting under item 3450, on page 293 of the same tariff, and on direct examination, while

neither had had any experience in connection with the classification of property of this character, both the witness Gemmill and the witness Matheson testified that these shipments could be called rough forgings or plain shafting (Tr. pp. 66, 70). However, on cross examination both admitted that the particular shafts in question, as shown by the specifications produced had to be prepared in accordance with plans and specifications, were machined to a certain extent, although roughly, and with flanges especially cast, at least on one end of each shaft (Tr. pp. 74, 82, 91).

The District Court at the conclusion of the argument as made by the attorneys for the respective parties found as a fact the material in question was, in fact, flanged shafts, roughly machine turned, and properly classified as Shafts or Shaftings as shown by items 4, 7 and 9, page 301, of the Western Classification No. 55 (Ex. 5), and later, Findings of Fact and Conclusions of Law were entered in accordance with the court's oral announcement.

The errors assigned all refer to alleged errors on the part of the court in entering the findings that were entered and in refusing to enter findings proposed by the plaintiff in error. No errors are assigned as to any other proceedings had at the trial.

ARGUMENT.

The shipments in question being interstate shipments, both the Director General as a carrier and the plaintiff in error as Shipper were bound by the duly filed and published tariffs governing their transportation.

In *Pennsylvania R. R. Co. vs. International Coal Mining Company,* 230 U. S. 184, the Supreme Court speaking through Mr. Justice Lamar briefly announced the principle which runs through all the cases, using this language:

> "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If as a fact the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation."

In *Great Northern Railway Company vs. O'Connor,* 232 U. S. 508, the Supreme Court in again speaking on this same question said:

> "It was not necessary to offer evidence to sustain the reasonableness of rates, classification, or other terms in the tariff filed with the Commission. The shipper had the right, by appropriate proceedings, to attack the rate or the classification, and, if either or both were held to be unreasonable, could secure appropriate relief either by reparation order, or by suit in court, after such finding of unreasonable-

> ness. But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties."

The duly filed and published tariffs governing the movement of the four cars in question are in evidence, as is the testimony of A. B. Cade, Superintendent of the Transcontinental Freight Bureau, who had for some thirty-nine years been engaged in the work of classifying commodities of this character, and familiar with hundreds of cars of the same character of material, he testified that the material on these cars was properly classified as shafts or shafting, and counsel for the plaintiff in error admitted at the trial if the material was of such a character as to be properly so classified, the amount sued for was correct (Tr. p. 36).

It is true that the plaintiff in error offered testimony which was sought to in a way contradict that of Mr. Cade and show that in fact the material transported was in fact, nothing more than rough forgings, or plain shaftings.

The District Court, however, found upon all of the evidence that the material was, in fact, shafts and properly classified in accordance with the testimony of Mr. Cade (Tr. pp. 13-17).

There was involved in the trial a question of fact as to the character of the material actually

transported; the question of its proper classification under the tariff being governed by the character of the material transported, but, as stated, this issue of fact was determined adversely to the contention of the plaintiff in error.

It would seem to be now an elementary proposition that an appellate Federal court will not review questions of fact or determine the weight to be given to evidence properly admitted, and counsel for the plaintiff in error assigned no error and makes no argument that any evidence was improperly admitted, all errors assigned going to the point that the plaintiff in error's Findings, rather than those actually signed, should have been entered, and in its brief states that the sole question presented is were the articles shipped shafts, as found by the court (Page 3, Appellant's Brief).

We believe that it is unnecessary to cite cases other than from this court in support of the rule that this court cannot and will not disturb the findings made by the District Court.

Empire State-Idaho Mining & Dev. Co. vs. Bunker Hill & Sullivan Mining & Concentrating Co., 114 Fed. 417.

Los Angeles Gas & E. Corp. vs. Western Gas Construction Co., 205 Fed. 707.

Sierra Land & Live Stock Co. vs. Desert Power & Mill Co., 229 Fed. 982.

American Trading Co. vs. North Alaska Salmon Co., 248 Fed. 665.

Oakland Water Front Co. vs. LeRoy, 282 Fed. 385.

The plaintiff in error in the first five lines under the heading of "Argument" makes the statement that there is no dispute as to the facts in this case, and that the sole question involved is one of construction and opinion, and that one man's opinion is as good as another's, and that the question involved is not one for expert evidence. However, with the exception of these five lines, all of the remainder of the argument consists of an argument of the facts, each page of the brief, excepting page 10 and two lines on the last page containing references to the testimony in support of the claimed error of the court in refusing to find that the material in question was not rough forgings, or that the court erred in holding that the materials in fact were shafts. For example, immediately after the opening paragraph of the argument, counsel refers to the plans and specifications (Exs. 1-4) and discusses the proper interpretation thereof as given by his witnesses.

There would have been no law suit if there had not been a dispute as to the question of fact as to whether these shafts were rough forgings or in fact shafts, and in this connection the statements on

pages 5 and 6 of the plaintiff in error's brief that the trial court may have been misled by the blue prints in evidence after taking the case under advisement is an inadvertence on the part of the attorney writing the brief, who apparently did not participate in the trial, for the record shows by questions propounded by counsel for both parties, and by the court himself that it was not contended that these shafts were machine turned down further than to one-eighth inch of final finish, and the fact is that the case was not taken under advisement, but the court announced his findings under the facts and the law immediately upon the conclusion of the argument.

In view of the errors assigned, and the argument as made in the plaintiff in error's brief, we respectfully submit that there is nothing for this court to pass upon. However, at the risk of unduly burdening the court, and for the sole purpose of making it easier for the court to understand the record, in view of our possible inability to orally present the case, but without in any way conceding the necessity therefor, as a legal proposition, we will endeavor to briefly deal with the facts developed at the trial.

2.

Page 301 of the Western Classification No. 55, in evidence (Exhibit 5), which the defendant in error contends covers the proper classification of this material, under a general heading of Machinery and Machines, specifically covers shafts or shafting, the portion of said page applicable to the commodities covered by this case reading as follows:

"Item 4. SHAFTS OR SHAFTING, iron or steel, other than Crank Shafts:

5. With CAMS OR FITTINGS, other than couplings, attached, such as bearings, pulleys or wheels:
Loose or in packages, L.C.L.....1
Loose or in packages, C.L., min. wt. 30,000 lbs.....A

6. With COUPLINGS ONLY ATTACHED:
Loose or in packages, L.C.L.....2
Loose or in packages, C.L., min. wt. 30,000 lbs.....A

7. Without CAMS, COUPLINGS or FITTINGS:

8. KEY-LEAVED OR KEY-SEATED:
Loose or in packages, L.C.L.....3
Loose or in packages, C.L., min. wt. 36,000 lbs.....A

9. Not KEY-LEAVED NOR KEY-SEATED:
Loose or in packages, L.C.L.....4
Loose or in packages, C.L., min. wt. 36,000 lbs.....5"

It will be noted that this is a general heading covering shafts and shafting, this shipment being classified under items 4, 7 and 9, that is, as shafts

or shafting without cams, couplings or fittings, and not key-leaved nor key-seated. The 5 after item 9 refers to the fifth class as contained in the tariff and, as stated, it is admitted that the rate sued for is the fifth class rate as contained in the tariff, the class A rate being higher.

The two tariff provisions under which the plaintiff in error sought to have these shipments classified are both found in West-Bound Tariff No. 4-0, in evidence as Exhibit 6, the item referring to forgings being included with other similar articles under item 3540, on page 296 under the head of articles of Iron and Steel, the particular section reading as follows:

"CASTINGS, N.O.S., as from mold, except being cleaned and drilled with bolt holes and dipped to preserve from rust, not machine- finished. Clevises,

Forgings, N.O.S., not further finished than being drilled with bolt holes,

3540 Wheels, sprocket, N.O.S., as from mold, except being cleaned and drilled with bolt holes and dipped to preserve from rust, not machine-finished.

NOTE. Articles described above may be shipped in mixed carloads with articles described in Item 3525 at rates and minimum weight named therein.

(2) Advance to points in "Rate Basis 3" of previous tariff.

(9) For explanation, see page 112."

The other classification covering plain shafting sought by the plaintiff in error to have applied is under a similar heading, being included in Item 3450 on page 293:

3450	"Band, Bar, Bars, corrugated or twisted, Slab (up to and Hoop,	Rod, (threaded or not threaded), *Shafting, plain (See Note 1),* including 6 inches in width).

Note 1.—Carload rates apply only on plain shafting without connections."

The letters "N.O.S." following the word "forgings," in item 3540, mean "Not Otherwise Specified in the Tariff" (Tr. p. 37).

It will be noted that *item 3450 refers solely to plain shafting,* and this is further modified by Note 1 which specifically provides that this shafting must be *without connections,* and there is considerable evidence in the record as to what plain shafting embraces.

There are in evidence, as Exhibits 1, 2, 3 and 4, the specifications produced upon demand by the plaintiff in error covering these shipments, and Mr. Cade testified, both from the records as made by his inspector, from his knowledge of the articles shipped, and from these specifications, that the contents of these cars were properly classified under Items 4, 7 and 9, page 300 of the Western Classification (Ex. 5), and were in fact shafts or shafting without cams or couplings, or fittings, and not key-

leaved nor key-seated (Tr. pp. 32, 34). He further testified that they could not be classified as forgings under Item 3540 as that item covered only forgings, not otherwise specified, and *not further finished than being drilled with bolt holes* (Tr. p. 32). This, of course, is exactly what the tariff describes, and, admittedly, these shafts were further finished in that they were turned to within one-eighth of an inch of final finish, those that were to be tapered were tapered, and flanges were forged and machined to some extent on at least one end of each piece.

Mr. Cade also testified that Item 3450 referring to plain shafting could not be applied as a coupling was forged on the end of each of these shafts, and that the shafting therein referred to meant what it said, i. e., plain shafting, such as was commercially carried and used (Tr. pp. 32, 98).

Mr. Cade testified that there was a great volume of shafts of this character shipped to the Pacific Coast during this same period, hundreds of cars, and that uniformly charges had been assessed in accordance with the rate set forth in the Western Classification under the heading of shafts and shafting, either upon the basis sued for herein or upon the basis of the Class A rate, which was 2c higher. The Interstate Commerce Commission later, in the case referred to in the plaintiff in error's brief, and in which Mr. Cade participated (66 I. C. C. 633)

held that the Class 5 rate, being the rate for which suit was brought, was applicable to this identical material (Tr. pp. 42-3), and that any freight collected in excess thereof on the basis of the Class A rate would amount to an overcharge (Tr. p. 55, Exhibit 12).

Mr. Cade also testified that not a single car or shipment, to his knowledge in all of his experience, machine or hog turned as was this, had ever been classified as forgings or plain shafting (Tr. p. 101). ~~given effect by the trial court (Tr. p. 42) or been classified as forgings or plain shafting (Tr. p. 1017).~~

Mr. Cade, after having examined his records and the specifications and prints as produced by the plaintiff in error (Exs. 1, 2, 3 and 4), testified as follows with reference to this material:

> "The material as originally shipped from Camden, New Jersey, was described by the shippers as so many pieces of rough forgings. Upon arrival at Seattle they were inspected by an inspector in my employ who, after an inspection of the material described them as rough-turned shafts, and, under a ruling received from the Western Classification Committee he also, in parenthesis, described them as machinery, indicating that the machinery carload rate was applicable. The material as indicated by blue-print and specifications shows the shipment or shipments to have consisted of what is termed rough-machined line shafts with flanges which are used as a coupling in connecting the lines. Those flanges—this material is further finished than is provided for in the

commodity tariffs which do provide a rating on forgings not further finished than being drilled with bolt holes.

"These particular shafts have been placed through a lathe and rough turned to within somewhere, I should say, within 1/8 of an inch of their final finished dimension.

"Under the conditions in which these particular shipments moved the provision in our transcontinental west-bound (31-10) commodity tariffs for forgings not further finished than bored with bolt holes, would not be applicable as they are specific provision and cover articles specified only, and would not apply upon an analogous article." (Tr. page 31-32.)

"We also carry in our West-bound Commodity Tariffs a provision for plain shafting, * * *." (Tr. page 32.)

"The understanding of the chairman of the Western Classification Committee that this type of shafting is not what is known to the trade in general as plain shafting; plain shafting being a round bar polished, sometimes cold-drawn, as they term it, through a die, which is used in transmission machinery where they run a line of shafting from one end of a building to another. That is a straight bar of steel similar to my pencil (illustrating), excepting various dimensions, without any coupling or any flange or any shoulders like that (illustrating). That is what is termed plain shafting.

"If this shafting is equipped with an extending flange, shoulders or projections of any kind, it ceases to be what is termed plain shafting in the classification sense." (Tr. pp. 32-33.)

This same witness, in answering the question put to him by the court as to the distinction from a rough forging, said:

"A shafting may be a forging, in its rough stage, which I will illustrate to you by pamphlets which I have here (showing). This pamphlet illustrates a steel ingot as poured into a mould; the ingot is then put into the furnace, heated and put under the hammer or press, illustrating what is termed a forging (showing) and, if it please your Honor, that is rough and still a forging, but it is in rough stage. There is a forging (showing another picture). Now, that later is put through a lathe. This shows a shaft in the lathe being turned (showing). That is the machine work that is placed on the article which brings it out and shows a further finish than the rough forging; that is turning down to a required dimension as shown in the specification." (Tr. page 40.)

He further testified that his experience had brought him in touch with a large volume of shipments of the same character, as well as with large quantities of just plain forgings, and in this connection testified:

"There has been a very heavy movement of this same material, line shafts, tail shafts and thrust shafts used in the shipbuilding industry during the war period, and our inspectors have watched the movement and properly described the material, and the 5th class rate has been applied. In some instances the class "A" rate has been applied through misunderstanding, which is 2c per hundred pounds higher than the 5th class rate from that particular territory.

"But the 5th class rates have been generally applied by all the North Coast lines and the lines leading into California, on this type of material until at a later date a specific rating

was provided by the West Bound Commodity Tariff." (Tr. page 42.)

In response to questions of Mr. Bronson, on behalf of the plaintiff in error, as to the blue prints which also showed the finished article, the witness testified that he considered, and the report of his inspector showed that the inspector considered these shafts only as being machine turned within 1/8 of final dimension. (Tr. page 46.)

On behalf of the plaintiff in error, *Mr. Gemmell,* its assistant secretary, who placed the orders for this material, *testified*:

> "*We ordered the shafting* from the Camden Forge Company, *rough turned to within 1/8 of the finished size.* That is, after we received the shafting we had to take off 1/8 inch all over, or 1/4 of an inch in diameter of the shafting and the couplings—(59-38) those flanges." (Tr. page 62.)

He further testified that the expense of the machine work would not exceed from two to three per cent of the purchase price, and that the real purpose of having the shaft machined or roughly turned was to be sure that it was not defective, the machining of the rough forging down to 1/8 of an inch of final dimension being such as would disclose any defects. (Tr. pp. 64-65.)

He also testified that he believed that this material could be considered as coming under Items

3540 and 3450 of the Commodity Tariff, which items are above set forth. In this regard he testified:

> "Q. In your opinion, Mr. Gemmill, as a machinery man, state to the court whether or not the shafting which is under discussion here comes within the definition in this Westbound Freight Tariff 4-O, page 296, Item No. 3540, specifying 'Forgings, N.O.S., not further finished than being drilled with bolt holes?'
>
> A. I believe that it does.
>
> Q. What is your opinion as to whether or not it comes within the definition contained on page 293, of the same book under 'Shafting, plain,' with the note below, 'Carload rates apply only on plain shafting without connections'?
>
> A. That rate can also be applied." (Tr. pages 65-66.)

On cross-examination Mr. Gemmill's attention was called to the specifications (Exhibits 1, 2, 3 and 4) wherein *he had ordered* not forgings or shafting, but "*forged steel shafts, rough turned,*" and finally admitted that this material used as it was on boats and in boat construction was ordinarily referred to as "*shafts.*" (Tr. p. 90.)

He further testified that the machinery houses would carry in stock ordinary shafting such as described by Mr. Cade, but that no machinery house carried in stock such shafts as were loaded on these cars, nor would the manufacturer carry them in stock, and in this regard he testified:

> "Q. As a matter of fact, these shafts

which you had made were all made in accordance with plans and specifications submitted?

A. They were.

Q. And the shafting which you carry on hand for your ordinary trade is the ordinary straight shafting such as is contained in that catalog, or of a similar character—Meese & Gottfried's?

A. Yes, sir, we carry that in stock." (Tr. pp. 91-92.)

This same witness testified that while they had never ordered considerable forgings with holes drilled only, as covered by Item 3540 of the Commodity Tariff, it was a fact that forgings of this character were purchased and were shipped to the Pacific Coast. (Tr. pp. 94-95.)

Mr. Matheson, the other witness for the plaintiff in error, testified, after reference was made to the provisions in the commodity tariff set forth by Item 3540 and then as to item covering plain shafting, as follows:

"Q. Are these forgings within such a description as that, Mr. Matheson?

A. Yes, I would say so, that they were.

Q. I will ask you whether or not they could come within the description here on page 293 of the same exhibit, 'shafting, plain,' having reference to Note 1, which reads as follows: 'Carload rates apply only on plain shafting without connections'; in other words, are they plain shafting and without connections?

A. Yes, that is their description." (Tr. p. 70.)

He also testified that the rough turning, or machine work, was done on these shafts for the purpose of determining whether or not there were any defects, and that the additional expense would only be from two to four per cent. (Tr. pp. 71-72.)

On cross-examination and referring to this material as distinguished from plain shafting, Mr. Matheson testified:

"Q. What do you use in ordering these particular articles; do you order shafting or do you order shafts, and in what way are they referred to on the prints and one thing and another which you prepare?

A. *Well, it would be a shaft.*

Q. A shaft—and all of these shafts as shown in evidence here are prepared according to blue-prints and specifications which are furnished, are they not?

A. Yes, sir.

Q. Now, there is such an article as plain shafting, as that term is understood in commercial business; is there not?

A. Yes, sir.

Q. And stocks of plain shafting are carried by various dealers in that character of articles?

A. Yes.

Q. Do you carry plain shafting?

A. We do not.

Q. Who does carry plain shafting in Seattle, if anyone?

A. Machinery houses carry it.

Q. And they have regular stock sizes, don't they?

A. Yes.

Q. And did you ever know of any commercial shafting carried in stock by machinery houses that was other than ordinary straight shafts?

A. No, I think not.

Q. If you want a shaft or shafting made with flanges on the end or anything of that kind you have to order it made, don't you?

A. Yes." (Tr. pp. 74-75.)

He also testified that rough forgings were ordered at times without any machine work (Tr. p. 77) and that when any machine work is done such as was called for by the specifications in this case there was a charge therefor.

Mr. Matheson's attention was then called to the specifications sent to the foundry, and as a matter of convenience for the court, and for the purpose of showing that this material was more than plain rough forgings, not further finished than being drilled with bolt holes, we quote some questions referring to the specifications, and Mr. Matheson's answers:

"Q. Now, referring to the next page, 'Tail shaft forgings rough turned to within $\frac{1}{8}$ inch

to 3/16 inch of finished diameters including taper and threaded ends, flanged coupling to have 1/8 inch finish all over as per drawing'; what does that mean, Mr. Matheson?

A. The end of a tail shaft is tapered to receive the propeller.

* * * * * * *

Q. That end is tapered down more than the main body of the shaft will be when it is completed, is it not?

A. Yes.

* * * * * * *

Q. Now it says 'Line shaft forgings rough turned to within 1/8 inch to 3/16 inch of finished diameters; flanged couplings to have 1/8 inch finish allowed all over.' What does that mean—flanged couplings to have 1/8 inch finish allowed all over?

A. Well, there is the flange on the end of the shaft. There is 1/8 inch material left all over.

Q. In other words, they were to leave 1/8 of an inch for the purpose of being finished out here?

A. There is 1/8 of an inch left on there all around.

* * * * * * *

Q. This says they can't go less than 1/8 of an inch. What interest would the Puget Sound Machinery Depot have in stopping them from doing more work if they were willing to do it at the same price? They, apparently, restrict them to finishing these couplings or flanges to an extent that they must not get closer than 1/8 of an inch.

A. Well, that is good practice. They could remove that 1/8 finish as easily as they could a 1/16. What I mean is that in taking the

finishing cut the lathe will remove 1/8 as easily as 1/16.

* * * * * * *

Q. (Interposing) That they were to turn the shaft proper, and they were to turn down the taper end?

A. Yes.

Q. And they were to turn the small flange end?

A. Yes.

Q. With flange on one end 8¾ inches diameter and the other tapered?

A. Yes.

Q. That means just one flange?

A. One end is tapered and the other end is slightly larger than the main part of the shaft. The main part is 7½ inches and the flange end here is 8¾ inches.

Q. On the other, No. 40, it says 'Forged steel shafts rough turned to within 1/8 inch of finished diameter including taper and threaded ends'—it should be on each end?

A. Yes.

Q. Now, in that case, as they would come from the factory with this rough turning, they would have this rough turned smooth and straight until it would get to each end and then both ends would be rough turned down to a point within 1/8 inch of the final dimension?

A. Yes." (Tr. pp. 80-82.)

In referring to the specifications in Item 3540, forgings with bolt holes only:

"Q. There are a great many different kinds of forgings?

A. Yes.

Q. And many of these forgings which are not for propeller shafts, do have holes drilled in them?

A. Yes.

Q. In the rough.

A. Yes.

Q. For wagon axles and purposes of that kind, that is correct?

A. Yes."

* * * * * * *

"Q. Now, it is not uncommon for forgings, without anything else being done to them, to have holes drilled in them?

A. No, sir, it is not." (Tr. pp. 82-83.)

There was produced by defendant in error and in evidence a machinery catalog (Exhibit 13) covering plain shafting, and both Mr. Gemmill and Mr. Matheson testified that such shafting was carried in stock both by the manufacturer and by the wholesaler, but that shafts such as ordered by the plaintiff in error always were constructed strictly in accordance with specifications submitted, and, of course, would not be carried in stock.

Further, Item 3450 of the tariff itself covers only plain shafting, without connections. There were connections, i. e., flanges forged on these shafts that were made to special order, and, with all due respect, we believe that the attempted classification

of this shipment as plain shafting is utterly without any merit.

We believe the specifications of themselves show that this material was not rough forgings not otherwise finished than by drilling for bolt holes, although further work had to be done in order to fit the shafts. True, the expense was only from two to four per cent, but both witnesses for the plaintiff in error testified that if these shafts were brought out to the Pacific Coast and lathed and found defective the manufacturer would have to take them back, and it is clear from the record that quite often these forgings when they were put in the lathe develop defects, so that there is a large item of additional value that is added by the machine work done at the plant, but irrespective of this fact, the tariff and classification as made, filed and published, become effective as a part of the statute itself, and neither the carrier nor the shipper can depart therefrom. If the shipper thinks that the rate is wrong, he cannot disregard the tariff, but is afforded full relief upon paying the tariff charges and filing his application for reparation with the Commission.

The conclusions offered by both Mr. Matheson and Mr. Gemmill are not based on any study of the tariff and classification. The item as to forgings covers only forgings that are not otherwise specified, and their conclusions in the light of the testimony

of Mr. Cade and the fact of the uniform application of the classification as made by the Director General upon hundreds of shipments will not be lightly overturned by any court.

3.

If there could be any question upon the classification of this material as made by those competent and skilled to make it, the matter has been put to rest by the opinion of the Interstate Commerce Commission in the case of *Northwest Steel Company vs. C. B. & Q. R. R. Co.,* 66 I. C. C. 633, which involved this identical commodity, and in passing upon the contention in that proceeding that this same commodity was but rough forgings, the Commission says:

> "The articles shipped were *not rough forgings as contended* by complainants and interveners. While not finished shafting they had progressed in manufacture beyond the forging state and were cognizable as shafting."

A reading of this opinion shows that a great number of ship building concerns intervened and it is safe for this court to assume that men skilled and able in the interpretation of tariffs and classifications and representing the shipbuilding industry, participated in this hearing; yet no one apparently had the temerity to suggest that these shafts should be classified as plain shafting, although the commis-

sion in comparing rates does refer to the item covering plain shafting. The contention was made, as was originally made in its initial letter (Ex. 12) by the plaintiff in error, that they were entitled to a rate covering rough forgings, but the commission, notwithstanding the fact that the evidence in those cases showed that the shops at a point of origin had not even machined down the steel to one-eighth of an inch final finish, nevertheless held that they were out of the category of rough forgings and were properly classified as shafts and took the fifth class rate.

While the plaintiff in error did not participate, as far as the record shows, in this hearing, it had a right to the benefits thereof, by paying the lawful charges in compliance with the positive mandates of the statute, under the authority of the case of *Phillips Company vs. Grand Trunk Railway,* 236 U. S. 662; 59 L. Ed. 774; and we respectfully submit that having such right it, in reason, should be likewise bound by the classification of this identical material as made by the Commission at a hearing held upon this coast in which the identical questions involved were determined.

The Interstate Commerce Commission has at its disposal a corps of trained experts versed in matters of this character. If an appeal had been taken, as we understand the law, no court would

have attempted to have interfered with its determination as to the character of this same kind of material.

Seaboard Air Line vs. U. S. 254 U. S. 57; 65 L. Ed. 129.

The findings of the Commission with reference to this character of material, even if held not conclusive, will be treated by this court as so persuasive as not to be overcome excepting upon a clear showing.

It may be thought, inasmuch as the Commission held that the rate of $1.69, as subsequently established is a reasonable rate (although later again raised, Cade Tr. p. 44), and awarded reparation to other shippers of this same commodity to this same territory, that then this court should confine the recovery to such rate basis. There are two answers to any such contention:

First: That plaintiff in error is not entitled to be heard until it has complied with its legal duty to pay the only legal rate which could be assessed at the time the shipment moved.

Second: That while its attention was called to the necessity of so doing and then filing its claim for reparation it has failed so to do until the period of limitations against any claim for reparation has elapsed. (Tr. p. 50.)

In this connection we call attention to the case of *Phillips Co. vs. Grand Trunk R. R. Co.*, 226 U. S.

662, 59 L. Ed. 774, in which the court said in a case in which reparation had been allowed certain shippers but in which the shipper in question had not brought his action within the statutory period:

> "The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carriers. The railroad company was therefore bound to claim the benefit of the statute here, and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action."

We also cite the case of *U. S. ex rel. Louisville Cement Co. vs. I. C. C.,* 246 U. S. 638, 62 L. Ed. 914. This case also goes into the question of the right to obtain reparation after the lapse of the statutory period, and is cited only for the reason that the claimant refused for a long period of time to pay the tariff rate but finally did pay it and filed his claim, the court holding, however, in this case that the limitation period did not commence to run until payment was made.

In any event, this court and all parties are bound by the tariff as it existed at the time these

shipments moved, as shown by the terms of the statute and as construed by the authorities we have already cited.

In *Pierce Co. vs. Wells-Fargo Co.,* 236 U. S. 278, 59 L. Ed. 576, Mr. Justice Day used the following language:

> "If the rates were unreasonable, it is for the Commission to correct them upon proper proceedings. If this were not so, the interstate commerce act would fail to make effectual one of its prime objects, the prevention of discrimination among shippers. So long as the tariffs are adhered to, shippers under the same circumstances are treated alike."

The judgment entered by the District Court should be affirmed.

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